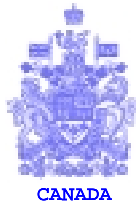
Canadian Human Rights Tribunal



Tribunal canadien des droits de la personne

BETWEEN:

AMANDA DAY

Complainant

- and -

DEPARTMENT OF NATIONAL DEFENCE
AND MICHAEL HORTIE

Respondents

RULING ON THE APPLICATION FOR AN ORDER ENSURING THE CONFIDENTIALITY OF THE INQUIRY

MEMBER: Dr. Paul Groarke

2003 CHRT 12
2003/03/07

I. INTRODUCTION

[1] At the opening of the hearing, the Respondents asked for an order closing the hearing to the public. In the alternative, they requested a ban on publication. The Complainant opposed both requests. After receiving the submissions of all the parties, I rejected the application to close the hearing and issued a ban on publication. I advised the parties that I would provide written reasons at a later date.

[2] The matter is governed by section 52(1) of the *Canadian Human Rights Act,* which gives the Tribunal the authority to:

> 52.(1) . . . take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that . . .
>
> (b) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
>
> (c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
>
> (*d*) there is a serious possibility that the life, liberty or security of a person will be endangered.

The Respondents acknowledged that they have the onus of establishing that an order protecting the confidentiality of the inquiry is necessary and that it is a high onus. They have also accepted that such an order should not be granted where there are other means of protecting the parties and the witnesses.

[3] There are a variety of interests that arise in the application before me. The first set of interests that favours publication seems to lie in the public domain. The common law is based on an independent, impartial and public process. There are also *Charter* considerations. I was referred to the guarantee of freedom of the press in section 2(b) of the *Charter of Rights*, which generally requires that

the process of adjudication be conducted in public. Section 2(b) may go further, however, since it protects freedom of opinion and expression, which is not possible without access to the information that permits that expression.

[4] The second set of interests that favours publication lies in the private realm. Section 11 of the *Charter*, for example, gives an accused in a criminal case a right to a trial in public. There may be a similar right in the human rights process, which gives either the Complainant or the Respondent the right to ask for a public hearing. Section 7 of the *Charter* might include some right to a public hearing, if it has a bearing on the psychological integrity of the participants. In *Blencoe* v. *British Columbia (Human Rights Commission)* [2002] 2 S.C.R. 307, the Supreme Court has held that there is nothing to prevent the operation of section 7 in the human rights process, where the appropriate circumstances exist.

[5] In the immediate case, most of the concerns on the other side relate to the privacy of the person. It is interesting that section 7 may also arise in this context, since it protects the psychological integrity of the person, which could be undermined by an open process. This is borne out by the wording of section 52(1)(d) of the *Canadian Human Rights Act*, which uses the same language as section 7. I have also been referred to section 8 of the *Charter*, which has been interpreted in a manner that protects the privacy of the individual person.

[6] The question of fairness seems to arise on both sides of the issue, since the idea of public hearings seems to have originated in the belief that public proceedings are open to scrutiny and are therefore inherently more fair than proceedings held *in camera*. The star chamber looms large in our legal history. The Respondents have argued on the other side that a public process, which destroys the reputation of innocent parties, is fundamentally invasive and unfair. They have submitted that a hearing that permits the publication of extravagant and unjustified allegations is unfair, even if it gives all of the parties a full and ample opportunity to present their cases. I think it is apparent that the concept of fairness in section 52(1)(b) of the *Canadian Human Rights Act* goes beyond mere procedural concerns.

II. THE BASIC RULE

[7] In spite of the wide variety of interests that come into play in the present application, the basic rule seems abundantly clear. Hearings must generally be conducted in public. This is as much a matter of accountability as anything else. The process must not be hidden. I believe this is the right place to begin. The mandate of fact-finding bodies like the Tribunal is to publicly establish what occurred in a given set of circumstances. I think this requires an open process, in which the competing positions are open to public scrutiny.

[8] This principle holds, whether the allegations are substantiated or not. The public's right to know is not restricted to the findings of a Tribunal and generally includes the allegations that have been made, however offensive they may be. There are additional concerns in the context of human rights, since one of the purposes of the human rights process is to educate the public. These kinds of considerations apply in all cases and are not limited to cases where a complaint is made out. The educational purposes of the human rights process are still served by public hearings in situations where the complaints do not succeed.

[9] The question is accordingly whether the circumstances before me are sufficient to justify a departure from the general rule. It is enough, in making such a determination, to consult the criteria set out in section 52(1) of the *Canadian Human Rights Act,* while remaining sensitive to any *Charter* considerations.

III. CLOSING THE HEARING

[10] I do not see any need to go beyond general principles in dealing with the request to close the hearing. The public has some right to know what happens at hearings. There are many cases that raise offensive allegations and something more is needed, to justify an *in camera* proceeding. The human rights process should be open to the public in all but the most compelling circumstances. I think the

integrity and reputation of the process would be jeopardized if hearings were closed merely because they deal with sensitive personal matters. One of the effects of closing the hearing would be to seal the entire transcript, a course of proceeding that effectively deletes the hearing from the public record. This goes much too far.

[11] In *Bouvier* v. *Métro Express* (1992) 17 C.H.R.R. 313, at para. 6, this Tribunal considered a similar application to move *in camera,* under an earlier and more austere section of the *Act*, apparently on the basis that it would injure the reputation of the corporate Respondent. The Tribunal refused to close the hearing:

> In view of how important it is that the judicial process in our society be public, and particularly in the area of human rights where the educational aspect of the process plays a leading role, and in view of the decisions in *Attorney General of Nova Scotia* v. *MacIntyre*, [1982] 1 S.C.R. 175 and *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326, we refused the request by Loomis that the hearing be held in camera.

I believe that there is a public right of inspection, which gives ordinary citizens the right to attend legal proceedings and observe how the system operates.

[12] This cannot be done behind closed doors, and it would be a mistake to pretend, in effect, that the hearing has not taken place. If the Respondents are entirely blameless, and beyond reproach, that does not change the fact that these allegations were made. I am not convinced that any blame accrues to the Respondents in airing such a fact before the public, which can be interpreted in a variety of ways. I think we have to rely on the ability of the public to distinguish mere allegations from statements of fact. The Respondents would have the usual civil remedies, if a member of the public was to confuse the two.

[13] The Complainant has openly expressed her lack of faith in a closed hearing and insisted on her right to confront the Respondents in public. She has also provided written submissions, in which she argues that it would be a mistake to “conceal” the hearing from the public. I think there is merit in her

submissions. The fact that these kinds of allegations are made in the course of the human rights process should not be hidden from the public. This line of reasoning extends beyond the hearing and encompasses the transcript of the proceedings, which should be open to inspection. This serves the societal interest mentioned in section 52, along with the legal and historical purposes of hearings.

[14] I should make it clear, before dealing with the application for a ban on publication, that I raised the possibility of briefly closing the hearing, if particular allegations met the requirements of section 52(1) of the *Canadian Human Rights Act*. I was informed, however, that this was not a practical alternative, given the number of allegations, and would require constant interruptions in the process. It would also require that portions of the transcript be sealed and removed from the public record. I am not comfortable with such a method of proceeding in the present case, and feel that it is preferable to give the public access to the transcript, which would still be subject to any ban on publication. I believe this goes as far as possible, in protecting the privacy interests of the parties and the public's right to know.

IV. THE BAN ON PUBLICATION

[15] Publication seems to be a separate matter. The Respondent has referred me to *Dagenais* v. *Canadian Broadcasting Corp*., [1994] S.C.J. No. 104 (QL), which dealt with an order restraining the CBC from broadcasting a television program dealing with the subject matter of a criminal indictment. Although the facts of the case have no real bearing on the case before me, the decision of the majority sets out the general test in such an application. A ban on publication should only be issued if:

1) it is necessary to protect the fairness of the trial or hearing; and

2) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

The Respondents have argued that this sets the fundamental parameters in any application for a ban on publication.

[16] The same kinds of concerns arise under section 52(1)(b) and (c) of the *Canadian Human Rights Act*, which nevertheless uses somewhat different language. The section states that a confidentiality order may be granted if “the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public”. The section recognizes that such a need may arise if there is “a real and substantial risk to the fairness of the inquiry”, or “a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved”. Although the same kinds of concerns might arise under subsection (d), I think it is sufficient to focus on these considerations.

[17] It will be apparent that *Dagenais* and many other cases deal with the freedom of the press. I do not believe that it would be prudent to comment on this aspect of the matter in the absence of submissions from an interested party, who can advance the necessary arguments on behalf of the press. Since *Dagenais* is a criminal case, it also focuses on the interests of the accused. This brings in the presumption of innocence, which is guaranteed in section 11 of the *Charter*. The major decision relied upon by the Respondents in this regard is *A*. v. *C*. [1994] B.C.J. No. 488 9 (B.C.S.C.) (QL), which dealt with an action for defamation arising out of extravagant complaints made to the police and the College of Physicians regarding allegations of sexual abuse. The court had ordered that pseudonyms be used. The case was cited before me for the proposition that the presumption of innocence protects parties in civil proceedings.

[18] I cannot deal with the case at length. At paragraph 23, the B.C. Supreme Court nevertheless adopts the view expressed in *Hirt* v. *College of Physicians and Surgeons of British Columbia* [1985] 3 W.W.R. 350, at p. 364, where McFarlane J.A. says:

> Public accessibility to the courts and to the records of the courts is needed so that society can be assured that justice has been done. Secrecy raises doubts in the public mind. But reasonable limitations upon the principle that justice must be done in the open have been recognized for many years in free and democratic societies. True

> justice must have respect for the rights or reputations of innocent persons.

Although the case discusses a number of other issues, this is the essential proposition that was put before me.

[19] Counsel for Respondents rested most of their submissions on the reputation and innocence of individuals who the Complainant accuses of gross misconduct and “lurid” sexual improprieties. The Respondents argued that the presumption of innocence that applies in a criminal context applies to unsavoury allegations that have been made in other proceedings. It was brought to my attention, for example, that two of the witnesses were the subject of separate complaints to the Human Rights Commission. These complaints were not pursued by the Commission and were never referred to the Tribunal. It was suggested to me that thedr witnesses are now being “dragged back in” to the process, against their will.

[20] This kind of argument seems more compelling in a case of harassment, where the law of human rights occasionally enters into the area of some of the allegations normally dealt with in the criminal courts. There are allegations of rape and forced sodomy, for example, before me. The real issue seems to be the sexual allegations: it was suggested that these kinds of allegations carry a particular stigma in our society, which attracts the cloak of confidentiality more readily than other allegations. Mr. Houston has stated on the record that “horrendous allegations” will arise during the course of the examination of witnesses, which may include allegations of child abuse.

[21] The Complainant may have competing interests. The Tribunal in *Bouvier*, supra, at paragraph 7, quotes from Madam Justice Wilson in *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326, at p. 1361, where she recognizes that an open process may serve more personal interests:

> But in addition to the interest of the public at large in an open court process there may be compelling arguments in its favour related to the interests of litigants generally. Many may feel vindicated by the public airing of the injustices they feel they have suffered alone and without any support in the

> community. Indeed, this may be the first time that a spouse is able to speak openly about events that have taken place in the privacy of the home. They may welcome the public endorsement for what they have suffered in private ignominy. (p. 1361)

The Respondents have essentially argued that this must not be taken too far. A Complainant should not be allowed to publicly punish a Respondent or innocent third parties, when the complaints are not made out. Nor is the hearing a therapeutic process. There is a concern in at least some of the cases with the use of the adjudicative process for improper or collateral purposes.

[22] The French version of subsection 52(1)(c) would seem to support such an argument. There must be a balancing. I am nevertheless of the view that at least some of the interests outlined by Madam Justice Wilson can be met by allowing the Complainant to make her allegations in public, with or without a ban on publication. Litigants are entitled to their day in court. The comments of Justice Wilson did not prevent the Tribunal in *Bouvier* from granting a partial ban on publication in far less compelling circumstances than the circumstances before me. The Respondent took the position that this was not a feasible manner of proceeding in the case before me, given the extent of the allegations and the notoriety of the case in the local community. I have already indicated that I would rather issue a ban on publication than repeatedly close the hearing for portions of the testimony.

[23] There is another aspect to this, however, which requires serious consideration. The Complainant has opposed the application for a confidentiality order. There are nonetheless good reasons, as the Respondents have suggested, to protect her privacy in this matter. The Respondents have taken the position throughout the present process that the Complainant is psychologically "ill" and suffers from delusions. I have been advised that she will be cross-examined on the minute details of her personal life and psychological history, which raises the most serious privacy concerns. I recognize the position that the Complainant has taken: she has nonetheless objected on a number of occasions to the disclosure of the details of her medical and psychological record. It seems to me that a confidentiality order would offer her some protection in this regard.

[24] I cannot comment on the merits of the case before me. There is nevertheless no doubt in my mind that many innocent people have suffered enormous personal and public damage as a result of sexual allegations, which our society finds opprobrious. The shame and humiliation that such people suffer should not be underestimated. The system should not victimize them. I believe that the interests of the public and perhaps the Complainant can be protected by reviewing the matter at the end of the hearing, at which time any ban on publication can be lifted. I should note in passing that counsel for the Respondents expressed an additional concern for the language employed by the Complainant in making these allegations, and a concern about less offensive accusations like theft. I do not find these concerns sufficient to justify a ban on publication.

V. ORDER

[25] I am accordingly prohibiting the publication of any of the evidence or matters that arise in the course of the present hearing. I believe this is in the interests of all of the parties, including the Complainant, and that publication would undermine the fairness of the inquiry and cause undue hardship to the persons involved. In the circumstances of the case, I am satisfied that this outweighs the normal rules in favour of a public hearing.

[26] I should make it clear that this ban is revocable and can be revisited if other parties wish to address the question, or the circumstances of the hearing warrant it. It does not extend to any of my rulings or the final decision in the case.

Dr. Paul Groarke

OTTAWA, Ontario
March 7, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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APPEARANCES:	
Amanda Day	On her own behalf
Joyce Thayer	For Department of National Defence
J. David Houston	For Michael Hortie